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No. 97-1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*
Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; *et al.*
Respondents.

Appeal from the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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6 pp

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THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, GASTON CAPERTON, Governor; LARRIE BAILEY, State Treasurer; GLEN B. GAINER, III, State Auditor; DARRELL V. McGRAW, JR., Attorney General; GUS DOUGLASS, Commissioner of Agriculture; HANK MAROCKIE, State Superintendent of Schools; and KEN HECHLER, Secretary of State,

Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; NICHOLAS, FAYETTE AND GREENBRIER RAILROAD COMPANY,

Respondents.

Appeal from the United States Court
of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

The arguments of the Respondents do not negate the fact that the decision below is a novel expansion of the Ex parte Young, 209 U.S. 123 (1908), doctrine beyond the permissible bounds of this Court's jurisprudence.

I. This Court Should Grant the Petition Because the Fourth Circuit's Decision Impermissibly Expands the Ex parte Young Exception Beyond this Court's Jurisprudence.

A. The Fourth Circuit's decision ignores the fact that state taxation is a special sovereignty interest.

To reach the issue of the possible application of the Ex parte Young exception to sovereign immunity, the Fourth Circuit had to first assume that the abrogation of immunity in the 4-R Act was invalid. The Board has not confused the Tax Injunction Act with the Eleventh Amendment.[1] The Railroads have made the same mistake the Fourth Circuit made. The Railroads and the Fourth Circuit assume that the Tax Injunction Act is the only bulwark against federal interference with State taxation. As this Court recognized, the Tax Injunction Act is "but a partial codification of the federal reluctance to interfere with [S]tate taxation." National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 590 (1995). Thus, to consider if an injunction would be appropriate, assuming there was prospective State action to enjoin, the Fourth Circuit should have considered the action being enjoined. The action sought to be enjoined in this case involves State taxation--a "special sovereignty" interest like the one in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. __, 117 S. Ct. 2028 (1997).

The availability of Ex parte Young relief in a State taxation case was recently considered by the United States Court of Appeals for the Tenth Circuit. ANR Pipeline Co. v. Lafaver, Nos. 96-3259 and 96-3345, 1998 WL 406632 (10th Cir. Jul. 21, 1998).[2] Two natural gas pipelines, which under Kansas law are public utilities like railroads, sued State officials. The pipelines complained that

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[1] See Railroads' Opp. at n.4. Nor has the Board "completely ignored" that language of Section 306 regarding the Tax Injunction Act. Railroads' Opp. at 9. As was explained in the Petition, while it is true that the 4-R Act evinced Congressional intent to allow federal courts to enjoin State taxation in certain cases, the Fourth Circuit's decision below assumed that the 4-R Act's abrogation was invalid. See Pet. at n. 4. The question the Fourth Circuit considered was the scope of federal courts' authority over State taxation of railroads absent the 4-R Act's abrogation of Eleventh Amendment immunity.

[2] This case was decided after the Petition was filed.

they did not receive the same "dramatic tax break" the railroads did under the 4-R Act. Id. at *2. In addressing the pipelines' claims for relief against the Kansas officials, the Tenth Circuit reached a different result than the Fourth Circuit's decision below.[3] The Tenth Circuit held that even the portions of the pipelines' requests for relief which were prospective and injunctive could not be granted because of this Court's decisions in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Coeur d'Alene Tribe, supra. Relying on this Court's decision in Coeur d'Alene Tribe, the Tenth Circuit considered the "crucial question" in deciding whether Ex parte Young relief was available against the State to be whether a State's power to assess and levy personal property taxes "'implicates special sovereignty interests.'" ANR Pipeline at *14 quoting Coeur d'Alene Tribe, ___ U.S. at ___, 117 S.Ct. at 2040. The Tenth Circuit held that State taxation was just such a special sovereignty interest, and no Ex parte Young relief was available.

Unless the Ex parte Young exception applies to this case, the State's Eleventh Amendment immunity applies. See Coeur d'Alene Tribe, ___ U.S. at ___, 117 S.Ct. at 2040. Eleventh Amendment immunity is jurisdictional. See Seminole Tribe, 517 U.S. at 76 (where a suit is barred by the Eleventh Amendment, it must be dismissed for lack of jurisdiction).

B. The Fourth Circuit's decision impermissibly provides retroactive monetary relief against a State.

The Railroads mistakenly assert in their Brief in Opposition that they were dependent on data in the possession of the West Virginia Department of Tax and Revenue in order to prove their claim.[4] The lack of this data, according to the Railroads, is to

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[3] The Tenth Circuit differs from the instant case in that it did not consider the availability of Ex parte Young relief in a case brought under the 4-R Act, but rather in a case in which other public utilities were arguing that they should receive the same drastic reduction in their taxes that railroads received because of the 4-R Act. However, in effect, the ANR Pipeline decision and the Fourth Circuit's decision do conflict in their results both with regard to whether Ex parte Young relief is available in the State taxation context after Coeur d'Alene Tribe and what constitutes retroactive relief in traditional Ex parte Young jurisprudence.

[4] This error is echoed in the Solicitor General's Brief in Opposition. Fed. Opp. at 8.

blame for the fact that the Railroads did not seek a preliminary injunction for the first one-half payment.[5] This assertion and the implication that it was the State's action (or inaction) which prevented the Railroads from prospectively seeking an injunction are false. The time period for the sales at issue was January 1, 1995, to December 31, 1995, and the information that the Railroads claim they could not get until the State issued its sales assessment ratio study was in fact available from the counties all along.

The Railroads also mistakenly assert in their Brief in Opposition that the Fourth Circuit "quite properly rejected the Board's tortuous arguments attempting to transform local funds into [S]tate funds." Railroads' Opp. at 10. This is a complete misreading of the Fourth Circuit's decision. The Fourth Circuit made no determination that the funds involved were local funds rather than State funds. In fact, the Fourth Circuit's entire discussion of the requested Ex parte Young relief assumes that the funds involved are State funds.[6] See, e.g., App. to Pet. A-12.

Neither of the above-identified assertions formed a basis for the Fourth Circuit's holding that prospective injunctive relief was available. And, since these assertions are not true, they offer no possible support for the Fourth Circuit's holding that the State's officials may be enjoined regardless of when the State defendants completed the tax assessment as long as collection had not yet occurred. This holding creates an exception to sovereign immunity which will effectively negate the Eleventh Amendment in the area of State taxation since collection always lags assessment. The Fourth Circuit's holding is an impermissible expansion of the Ex parte Young doctrine and, with regard to the first one-half

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[5] The lack of this data did not prevent the Railroads from filing suit however. The Railroads filed suit in October 1996, after its first one-half payment was paid in full, but three months before the State published its sales assessment ratio study and gave the underlying data to the Railroads.

[6] The Fourth Circuit correctly assumed that the funds at issue were State funds and did not examine whether there would be a different result if the funds were actually local funds. The Tenth Circuit in ANR Pipeline found that it need not determine whether the funds at issue in that case were State or local, despite the pipelines' vehement argument that the funds were local, because under Coeur d'Alene Tribe the proper inquiry is whether the requested relief is the functional equivalent of legal relief that would be prohibited by the Eleventh Amendment. ANR Pipeline at n.17.

payment, is erroneous since collection of that payment had occurred. Contrary to the Railroads' argument and the Fourth Circuit's decision, the Railroads' tax money for their first one-half payment is not still in their pockets. The Tenth Circuit in ANR Pipeline, in contrast to the Fourth Circuit's decision below, did not consider the question of whether the taxes at issue had been collected because the pipelines were requesting that the federal court compel the State to "recertify" past years' tax assessments, i.e., retroactive relief. ANR Pipeline at *11. The pipelines in ANR Pipeline, like the Railroads in this case, were seeking to rectify past assessments. The Railroads' focus on collection does not negate the fact that a change in collection affects the prior assessment.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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